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No. 05-7053

IN THE SUPREME COURT OF THE UNITED STATES

KESHIA CHERIE ASHFORD DIXON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly instructed the jury that petitioner had the burden of proving her affirmative defense of duress by a preponderance of the evidence.

2. Whether the district court's exclusion of expert testimony on battered woman's syndrome deprived petitioner of a fair trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 413 F.3d 520.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2005. A petition for rehearing was denied on July 20, 2005 (Pet. App. B1). The petition for a writ of certiorari was filed on October 17, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of one count of acquiring a firearm while under indictment, in violation of 18 U.S.C. 922(n); and eight counts of making a false statement to purchase a firearm, in violation of 18 U.S.C. 922(a)(6) and 924(a)(2). She was sentenced to nine concurrent terms of thirty-four months of imprisonment, to be followed by three years of supervised release, and ordered to pay a $900 special assessment. The court of appeals affirmed. Pet. App. A1-A10.

1. On January 4 and 11, 2003, petitioner purchased multiple firearms at two separate gun shows in Dallas, Texas, by providing false information to gun dealers. Petitioner provided an incorrect address and stated that she was not under indictment for a felony, when in fact she had been indicted for her role in a check-cashing scheme. In each instance, the dealer sold petitioner a firearm after running her information through the National Instant Criminal Background Check System and receiving a "proceed" response. Pet. App. A2; see Indictment 1-4.

2. On March 5, 2003, a federal grand jury returned an indictment charging petitioner with the nine counts on which she was eventually convicted. See Indictment 1-4.

At trial, petitioner admitted that she knew she was under federal indictment when she purchased the firearms and that she had

committed an offense each time she had provided false information. Petitioner raised the defense of duress, alleging that her boyfriend, Thomas Earl Wright, and one of his associates had coerced her into purchasing the firearms for them. Petitioner testified that Wright beat her on a regular basis, threatened her children, and controlled her movements by taking her car keys or accompanying her wherever she went. Petitioner's description of the relationship was largely corroborated by the testimony of her two daughters. Petitioner also testified that she was afraid that, if she did not buy the firearms for Wright, he would harm or kill her or her daughters. Pet. App. A2-A3; Gov't C.A. Br. 5-6.

Each of the gun dealers testified that petitioner had been accompanied by several men at the gun shows, but that they did not appear to be controlling her purchases. On cross-examination, petitioner admitted that she was not in any immediate danger of physical harm while at the gun shows. She also admitted that she had opportunities to extricate herself and her daughters from the abusive situation but had failed to act. Petitioner and her daughters admitted that they had never reported the alleged abuse or threats to relatives, school officials, court personnel, or law enforcement officers, even though they had opportunities to do so. Pet. App. A2; Gov't C.A. Br. 7-8.

In support of her duress defense, petitioner sought to introduce expert testimony from Dr. Toby Myers about the reactions

of battered women to their abusers. The district court held that Myers's testimony was inadmissible to show duress because it addressed petitioner's subjective intentions. Petitioner was allowed to proffer Dr. Myers's testimony outside the presence of the jury. Pet. App. A3; Gov't C.A. Br. 8.

Petitioner requested the district court to instruct the jury that she had the burden of producing evidence to support each element of the duress defense and that, if she did so, the government had to prove beyond a reasonable doubt that petitioner was not under duress when she purchased the firearms. The court denied petitioner's request and instructed the jury that petitioner had the burden of establishing the defense of duress by a preponderance of the evidence. Pet. 8.

3. On appeal, petitioner argued that the district court erred, inter alia, in excluding Dr. Myers's expert testimony and in giving a jury instruction that placed the burden on petitioner of proving duress by a preponderance of the evidence. Pet. App. A3.

a. The court of appeals held that the district court did not abuse its discretion in excluding Dr. Myers's testimony because the testimony was inadmissible under Federal Rule of Evidence 702. Pet. App. A3-A8. The court stated that a duress defense "requires an objective inquiry into whether [petitioner's] conduct, although illegal, represented her only reasonable alternative to serious bodily injury or death." Id. at A5. The court of appeals observed

that, in United States v. Willis, 38 F.3d 175 (5th Cir. 1994), cert. denied, 513 U.S. 1141 (1995), it had held that expert testimony that a defendant "suffers from the battered woman's syndrome" is inadmissible to support a defense of duress because the testimony is "inherently subjective." Pet. App. A5 (quoting Willis, 38 F.3d at 175, 177). In petitioner's case, the court held that most of Dr. Myers's proffered testimony was likewise subjective because it described petitioner's perceptions of danger. Under Federal Rule of Evidence 702, such testimony would therefore not have assisted the jury in making a determination of material fact -- i.e., whether petitioner's fear was "well-grounded" or "objectively reasonable under the circumstances." Pet. App. A6. The court further reasoned that the proffered testimony was not rendered admissible by Dr. Myers's assertions that petitioner's fears were reasonable; the court observed that these conclusory statements were a "transparent strategy" to insert "'objective' characterizations" into testimony that otherwise focused on petitioner's subjective perceptions. Id. at A6 n.2.

In addition, the court of appeals concluded that, to the extent Dr. Myers proffered objective testimony about the facts of petitioner's relationship with Wright, that testimony was inadmissible hearsay. Pet. App. A7-A8. The court noted that, although facts on which an expert opinion is based need not be admissible for the expert's opinion to be admissible, "[t]he

adverse if this statement * * * is not true." Ibid. The court explained that when an expert's opinion is inadmissible, so too is the hearsay on which it is based. Id. at A9. As the court observed, "[w]ere it otherwise, designation as an 'expert' would permit any such witness -- regardless of her qualification or the relevance of her testimony -- to escape the ambit of the hearsay rules." Ibid. Thus, given the inadmissibility of Dr. Myers's opinion testimony, she was not competent to testify "as to facts of [petitioner's] relationship with Wright based solely on what others told her." Ibid.

b. The court rejected petitioner's claim that it was error to instruct the jury that she bore the burden of proving her duress defense by a preponderance of the evidence. Pet. App. A10. Relying on circuit precedent (Willis, 38 F.3d at 179), the court held that a defendant has the burden of establishing affirmative defenses such as duress. Ibid.

ARGUMENT

1. Petitioner contends (Pet. 10-14) that the district court erred in instructing the jury that she had the burden of proving her duress defense by a preponderance of the evidence, and that the decision of the court of appeals conflicts with decisions of other courts of appeals. Petitioner's contentions do not warrant review. The court of appeals correctly recognized that a defendant has the burden of proving the affirmative defense of duress. In any event,

reliance on the facts presented petitioner was not even entitled to a duress defense instruction, this case does not present a suitable vehicle for resolving any disagreement among the courts of appeals on that issue.[1]

a. The decision below is correct. Duress is a common law defense that federal criminal law has incorporated. See United States v. Bailey, 444 U.S. 394, 409-410 (1980). The Due Process Clause does not require the government to bear the burden of disproving an affirmative defense. See Patterson v. New York, 432 U.S. 197, 210 (1977). Nor is the Due Process Clause violated simply because evidence introduced to support an affirmative defense, on which the defendant bears the burden of proof, may "tend to negate" an element of the crime. Martin v. Ohio, 480 U.S. 228, 233-234 (1987). In Martin, this Court held that a State does not violate due process by requiring a murder defendant to bear the burden of proving self-defense, so long as the State permits the jury to consider the self-defense evidence in determining the existence of the elements of the offense. Ibid. Similarly, requiring a defendant to establish duress does not "offend[] [any] principle of justice so rooted in the traditions and conscience of

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[1] This Court previously has denied certiorari on this issue. See, e.g., Dodd v. United States, 532 U.S. 959 (2001) (No. 00-7186); Deleveaux v. United States, 530 U.S. 1264 (2000) (No. 99-8942); Warrick v. United States, 526 U.S. 1070 (1999) (No. 98-9259); Bennett v. United States, 525 U.S. 1042 (1998) (No. 98-8297).

[illegible] as to be ranked as fundamental." Patterson, 432 U.S. at 202 (internal quotation marks omitted).[2] Indeed, placing the burden on the defendant reflects the defendant's superior ability, in the usual case, to adduce the facts supporting an affirmative defense. See United States v. Deleveaux, 205 F.3d 1292, 1300-1301 (11th Cir.), cert. denied, 530 U.S. 1264 (2000).

b. Petitioner argues (Pet. 11-14) that this Court should grant review because, contrary to the Fifth Circuit in this case, other courts of appeals have ruled that where evidence supports a duress defense, the government is required to disprove it. There is some disagreement among the courts of appeals as to which party should bear the burden of persuasion on duress. Like the Fifth Circuit, the Ninth and Eleventh Circuits have held that the defendant bears the burden of proving all of the elements of duress by a preponderance of the evidence. See, e.g., United States v. Fei Lun, 139 F.3d 1303, 1307-1308 (9th Cir.), cert. denied, 525 U.S. 904 (1998); United States v. Dominguez-Mestas, 929 F.2d 1379, 1384 (9th Cir.) (per curiam), cert. denied, 502 U.S. 958 (1991);

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[2] In Patterson, 432 U.S. at 210, and Martin, 480 U.S. at 233, the applicable state criminal code specifically provided that the defendant bore the burden of proving certain affirmative defenses. In upholding that burden allocation, however, this Court did not state that only a legislature has the authority to allocate the burden in that fashion. As the Third and Eleventh Circuits have concluded, when an affirmative defense is read into a statute, "it is within the province of the courts to determine where the burden of proof on that defense is most appropriately placed." United States v. Dodd, 225 F.3d 340, 345 (3d Cir. 2000), cert. denied, 532 U.S. 919 (2001); see Deleveaux, 205 F.3d at 1300.

Dominguez-Mestas, 929 F.2d at 1382-1383.[1] The Second, Sixth, Seventh, Eighth, and Tenth Circuits have indicated that, once the defendant puts forward evidence sufficient to present the duress defense to the jury, the burden shifts to the prosecution to disprove beyond a reasonable doubt at least one of the elements of the defense. See United States v. Mitchell, 725 F.2d 832, 833, 836 (2d Cir. 1983); United States v. Riffe, 28 F.3d 565, 568 n.2 (6th Cir. 1994); United States v. Talbott, 78 F.3d 1183, 1185-1187 (7th Cir. 1996) (per curiam); United States v. Simpson, 979 F.2d 1282, 1287 (8th Cir. 1992), cert. denied, 507 U.S. 943 (1993); United States v. Scott, 901 F.2d 871, 873 (10th Cir. 1990). The First and Third Circuits appear to take an intermediate view, under which the burden depends on whether the offense requires the government to prove specific criminal intent. See United States v. Amparo, 961 F.2d 288, 291 (1st Cir.), cert. denied, 506 U.S. 878 (1992); United States v. Santos, 932 F.2d 244, 249 (3d Cir.), cert. denied, 502 U.S. 985 (1991); see also United States v. Diaz, 285 F.3d 92, 96-97 (1st Cir. 2002) (discussing limited reach of Amparo); United States v. Dodd, 225 F.3d 340, 345-346 (3d Cir. 2000) (discussing limited reach of Santos), cert. denied, 532 U.S. 959 (2001).

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[1] Although petitioner quotes (Pet. 10-11) the Ninth Circuit's decision in United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977) (per curiam), cert. denied, 435 U.S. 1000 (1978), as supporting her approach, the Ninth Circuit in Dominguez-Mestas held that Hearst's statement regarding the burden of proof of duress was dictum. Dominguez-Mestas, 929 F.2d at 1383.

This case, however, is not an appropriate vehicle for resolving the conflict among the circuits in the burden of proof issue because petitioner was not even entitled to a jury instruction on her putative defense. Although "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor," Mathews v. United States, 485 U.S. 58, 63 (1988), the affirmative defense of duress should be submitted to a jury only if evidence of each element of the defense is adduced at trial, see Bailey, 444 U.S. at 415. As petitioner acknowledges, that is the law even in the courts of appeals that apply the approach that she advocates with respect to the burden of proof. Pet. 10 ("Courts are generally agreed that the defendant must introduce evidence on all elements of the defense before the jury can be instructed on the defense.").

At common law, "[d]uress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law." Bailey, 444 U.S. at 409. In this case, petitioner does not contest the court of appeals' statement of the elements of a duress defense: (1) a present and imminent threat of "such a nature as to induce a well-grounded apprehension of death or serious bodily injury"; (2) no negligent or reckless conduct by petitioner that placed her

in a situation in which it was probable that she would be forced to choose the criminal conduct; (3) no reasonable, legal alternative to violating the law; and (4) a direct causal relationship between the criminal action and avoidance of the threatened harm. Pet. App. A4-A5 (quoting Willis, 38 F.3d at 175). Thus, petitioner could not have prevailed on her claim of duress, nor should the defense even have been submitted to the jury, if the evidence showed that she had "a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm.'" Bailey, 444 U.S. at 410 (citation omitted).

Petitioner failed to show that she had no reasonable, legal alternative to violating the law. On cross-examination, petitioner admitted that she was not in any immediate danger of physical harm at the gun shows; had opportunities to extricate herself and her daughters from the abusive situation, but had failed to act; and had never reported the alleged abuse or threats to relatives, school officials, court personnel, or law enforcement officers, despite having opportunities to do so. Gov't C.A. Br. 7-8. Given these opportunities to escape from the coercive influence of Wright, petitioner had a reasonable alternative to acquiring firearms and making false statements at the two gun shows. See Bailey, 444 U.S. at 410. Because petitioner did not avail herself of that alternative, she was not entitled to the duress instruction

she could receive, left with the government to disprove duress beyond a reasonable doubt. See, e.g., United States v. Johnson, 416 F.3d 464, 466-469 (6th Cir. 2005) (defendant not entitled to duress instruction where he failed to warn bank security guard of impending robbery, although he had the opportunity to do so); United States v. Glass, 128 F.3d 1398, 1409 (10th Cir. 1997) (defendant not entitled to duress instruction where she failed to avail herself of reasonable opportunity to seek assistance of law enforcement authorities); United States v. Sotelo, 94 F.3d 1037, 1040 (7th Cir. 1996) (inmate defendant not entitled to duress instruction where he had reasonable opportunity to seek assistance of prison authorities); United States v. Miller, 59 F.3d 417, 422 (3d Cir. 1995) (duress instruction properly refused where defendant talked to authorities, but did not disclose threats underlying claim of duress).

2. Petitioner also contends (Pet. 15-24) that she was deprived of a fair trial by the district court's exclusion of Dr. Myers's testimony. She claims that the court of appeals' decision conflicts with the decisions of other circuits, as well as with decisions of state courts recognizing the admissibility of expert testimony on battered woman's syndrome. Further review of these contentions is unwarranted.

a. Although a defendant has the constitutional right to present a defense to the jury, the right does not include an

"unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Taylor v. Illinois, 484 U.S. 400, 410 (1988). Thus, testimony may be excluded "through the application of evidentiary rules that themselves serve the interests of fairness and reliability -- even if the defendant would prefer to see that evidence admitted." Crane v. Kentucky, 476 U.S. 683, 690 (1986). In this case, the district court allowed petitioner to present the facts underlying her duress defense, but excluded Dr. Myers's proffered testimony under Federal Rule of Evidence 702, which authorizes the admission of qualified expert testimony only if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." The introduction of expert testimony is a matter committed to the discretion of the district court, and the district court's ruling will not be reversed unless it is "manifestly erroneous." General Elec. Co. v. Joiner, 522 U.S. 136, 142 (1997); see generally Daubert v. Merrell Dow Pharmaceuticals Co., 509 U.S. 579, 591-593 (1993).

The district court did not abuse its discretion in excluding the proffered expert testimony. As the court of appeals explained, most of that testimony concerned petitioner's "subjective vulnerability to coercion" and her "subjective perceptions of danger." Pet. App. A5-A6. As such, it was irrelevant to whether petitioner's perceptions were "well-grounded" or "objectively

inadmissible" for purposes of proving her asserted duress defense. Id.; cf. Johnson, 416 F.3d at 469 (rejecting argument that defendant's duress defense should be judged by a "reasonable retarded person standard" because that would "collapse into a subjective, individualized inquiry in each case").

Contrary to petitioner's suggestion (Pet. 15), the court of appeals did not simply rest on its holding in Willis, 38 F.3d at 176-177, that evidence of battered woman's syndrome is inherently subjective. The court went on to consider whether any portion of the proffered expert testimony was objective, and noted that one type of objective expert testimony recognized by courts since Willis "is that which describes the typical patterns, circumstances and effects of battery within an abusive relationship without attempting to draw any conclusions therefrom as to the subjective perceptions of a particular defendant." Pet. App. A7 & n.3. But the court concluded that the only objective testimony proffered by Dr. Myers was inadmissible hearsay. Id. at A7-A8. The court's measured, fact-bound determination does not warrant review.

b. Petitioner erroneously contends (Pet. 15-17) that the court of appeals' decision conflicts with the Second Circuit's decision in United States v. Smith, 987 F.2d 888, cert. denied, 510 U.S. 875 (1993), and the Tenth Circuit's decision in Dunn v. Roberts, 963 F.2d 308 (1992). In Smith, the Second Circuit held that the defendant's request for the appointment of a psychiatrist

to assist with the development of a duress claim should have been granted because a psychiatrist could have testified to issues other than defendant's "unusual susceptibility" to coercion, and could have testified at sentencing. 987 F.2d at 890-891. In so holding, the court emphasized that the duress defense requires an "objective showing" of a "well-founded fear" such that a person of "reasonable firmness in his situation would have been unable to resist." Ibid. That is entirely consistent with the holding below that expert testimony on petitioner's subjective perceptions of danger was not relevant to her duress defense.

Petitioner's reliance on Dunn is equally misplaced. There, the state trial court had refused the defendant's request for funds to employ a psychiatrist to investigate whether she suffered from battered woman's syndrome. 963 F.2d at 309-311. The Tenth Circuit held that refusal of the request was a denial of due process because evidence of battered woman's syndrome was relevant to whether the defendant had the specific intent necessary to commit the crime of aiding and abetting. Id. at 313-314. As petitioner acknowledges (Pet. 17), the Tenth Circuit's holding was based only on the mens rea element of the charged crime. The Dunn court expressly did not address whether evidence of battered woman's syndrome would have been relevant to an affirmative defense of duress. Id. at 312 n.2. In this case, petitioner challenged the exclusion of expert testimony only as it related to her duress

defense, Pet. 11; Pet. C.A. Br. 11; thus, the decision below does not conflict with Dunn.[4]

c. Petitioner also asserts (Pet. 18) that the court of appeals' decision conflicts with the decisions of three state supreme courts. Those decisions, however, relied exclusively on state law; they did not apply federal law on duress or decide the admissibility of expert testimony under Federal Rule of Evidence 702. See State v. B.H., 870 A.2d 273, 285-289, 291 (N.J. 2005); State v. Williams, 937 P.2d 1052, 1058 (Wash. 1997); State v. Riker, 869 P.2d 43, 47-48 & n.1 (Wash. 1994); McMaugh v. State, 612 A.2d 725, 733 (R.I. 1992). Therefore, even to the extent those cases may be inconsistent with the decision below, they do not warrant review of that decision.[5]

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[4] Nor is there any conflict (Pet. 21-22) with the Eighth Circuit's decision in Arcoren v. United States, 929 F.2d 1235 (8th Cir.), cert. denied, 502 U.S. 913 (1991). There, the government was allowed to present expert testimony of battered woman's syndrome in order to explain why, at trial, the defendant's wife had recanted her prior grand jury testimony that defendant had beaten and raped her, and raped another woman. Id. at 1238-1241. The witness's subjective motivation to change her testimony assisted the jury in determining which version of her testimony to believe. Id. at 1241.

[5] Petitioner goes on to discuss (Pet. 20-24) additional state court cases involving the admissibility of evidence of battered woman's syndrome on issues other than duress. Those cases are similarly irrelevant to the district court's exclusion of expert testimony in this case.

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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2005